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IN THE

Supreme Court of the United States

No. 175

PARTMAR CORPORATION, *Petitioner*,
UNITED STATES OF AMERICA, *Plaintiff*

v.

PARAMOUNT PICTURES, INC., ET AL., *Defendants*.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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May 4, 1949.

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CONTENTS.

	Page
Jurisdiction	1
Statutes	1
Statement	2
Argument—	
The appeal was not taken for and will not cause delay	10
The questions on which the decision of the cause depends are substantial	12

CITATIONS.

United States v. Paramount Pictures, 334 U. S. 131	5
United States v. Paramount Pictures, 66 F. Supp. 323.	12

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The order of the District Court denying the application for intervention was entered on March 3, 1949. No opinion of the Court was stated or written. Some reasons for which the intervention was denied are indicated here and there in the transcript of the proceedings.

JURISDICTION.

Jurisdiction of this Court is based on section 2 of the Expediting Act (United States Code, Title 15, section 29; and 28 U. S. C. 2101).

STATUTES.

Rule 24, Federal Rules of Civil Procedure:

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT.

In this case the mandate of this Court required the District Court (1) to vacate its judgment of December 31, 1946, as to so-called franchises, i.e., long-term contracts for motion pictures, and to re-examine that subject in the light of the elimination from that judgment of competitive bidding; and (2) to ascertain what, if any, theatres the defendants had acquired or maintained by monopoly methods or used in restraint of trade, and to divest them of such theatres.

Partmar Corporation, the appellant, had a franchise from Paramount Pictures, Inc., which the film company refused to perform after the judgment of December 31, 1946, and ostensibly pursuant to that judgment. Partmar

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also leased a theatre in Los Angeles from Paramount, in which it used the pictures. On the theory that the injunction against the franchise gave Paramount the right to end the tenancy before the expiration of the term, Paramount is also attempting to evict appellant, so that Paramount may take over the theatre for its own use. Compliance with the mandate as to that one theatre only would have rendered the attempt to evict appellant and the purpose to continue the monopoly use of the theatre futile.

But the mandate was not applied. Instead, Paramount and the plaintiff agreed to a final consent judgment which discarded the principle of divestiture of the mandate, especially in requirements which would have relieved the appellant as an independent exhibitor. Appellant, therefore, sought to intervene and have the District Court receive evidence from it showing that the theatre in Los Angeles had been acquired and maintained by Paramount by monopoly methods, had been used in restraint of trade, and that the termination of the film franchise and the eviction constituted a continuation of those methods. It asked that the judgment should affirmatively prevent retention of that particular theatre and prevent the enforcement of default conditions incidental to an enjoined franchise to divest an independent exhibitor of a leasehold estate in a theatre.

Partmar is a small independent motion picture exhibitor, and is one of the very few independent exhibitors in the country who has had a first-run business. Since 1933 it has leased and operated the Paramount Theatre in Los Angeles, the real estate of which is owned by Paramount.

The facts alleged in the application for intervention (which would have been proved by appellant), are that the theatre was originally acquired by Paramount for the purpose of restraining and monopolizing the exhibition of motion pictures; that from 1927 to 1933, prior to the lease

to Partmar, the theatre was pooled with other theatres by Paramount and other defendants; that in 1933 Paramount offered to lease the theatre to Partmar, but only on condition that all of the playing time should be used for Paramount's pictures, and that Partmar should charge admission prices named by Paramount.

On March 3, 1933, Paramount leased the theatre to Partmar for a term of ten years, and subsequently made succeeding leases, the current one of which will expire in March 1952. At the same time, Paramount made a contract to furnish pictures for the theatre for the same period, followed by succeeding contracts, the current one of which will also expire in March 1952. The first picture contracts required the tenant to use all playing time for Paramount pictures; in the current contract the requirement is reduced to forty-six weeks per year of playing time. The leases provided that if the picture contract should be terminated, Paramount should have the option to terminate the lease and evict the tenant. This option was reserved for the purpose of, and is now used, to enforce the monopoly of the playing time and the exclusion of competitive pictures.

The tenant was required to pay excessive rental for the theatre, excessive picture license fees, and in many instances was required to accept, show and pay for inferior feature pictures and short subject pictures which it did not and could not use.

On March 26, 1947, Paramount informed the tenant that it had been enjoined by the Court below from further performing the picture contract, and that for that reason demanded that Partmar vacate in three days. Partmar refused on the ground that the defunct judgment of the District Court did not require that it be evicted, and that eviction because of inability to continue the monopoly of its playing time was not lawful.

On May 1, 1947, Paramount filed an action in the District Court of the United States at Los Angeles, to evict appel-

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lant, on the ground that the vacated decree of the District Court authorized an eviction of appellant, for the purpose of enabling Paramount to re-establish the pre-emption of the playing time of the theatre under its own operation. The case is now pending.

On May 3, 1948, this Court decided the case of *United States* v. *Paramount Pictures, Inc., et al.*, 334 U.S. 131, and remanded the case to the District Court for further proceedings, among other things, with regard to franchises and divestiture of theatres.

As to franchises, the Court said, among other things:

> The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of *all* features was disadvantageous to competitors. (p. 155)
>
> • • • • •
>
> But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. (p. 156)
>
> • • • • •
>
> Hence we set aside the findings on franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding. (p. 156)
>
> • • • • •

As to divestiture of theatres, the Court indicated that theatres which had been acquired or maintained by monopoly methods, or which had been used in restraint of trade, should be divested, to the end that the defendants should not enjoy reward from the conspiracy through retention of its fruits, and so that a condition in harmony with the law should exist. The case was remanded for divestiture in accordance with the principle indicated.

On March 4, 1949, a judgment negotiated and agreed to by Paramount and the plaintiff, was entered as to the Paramount defendants, as the judgment recites, "without any decision by this Court upon any of the issues and matters which were to be determined upon said remand, without any

findings of fact upon such issue and matters made after said remand . . ." (Judgment, pp. 2-3).

The judgment stated that "This judgment is rendered and entitled in lieu of and in substitution for the decree of this Court dated December 31, 1946." (Judgment, p. 66).

As to franchises that judgment provided that—

> The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined;
>
> • • • • •
>
> 5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. (Judgment, p. 4)

Appellant asked that the District Court add to this provision a minor complementary prohibition against dispossessing an innocent lessee, like Partmar, by enforcing a condition incident to an exclusive dealing requirement. That and nothing more, as to the franchise, was requested.

As to the divestiture provisions, the theatres may be placed in three classes: (1) joint ownerships between defendants; (2) joint ownerships between defendants and independents; and (3) all other threatre holdings affected by monopoly or restraint of trade.

As to joint ownerships between defendants, these were enjoined by the decree of December 31, 1946, in the statement that Paramount is enjoined "From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant"; that injunction was approved by this Court; and in the consent judgment of March 4, 1949, the injunction is repeated in the same words. Paramount had 195 theatres jointly owned with other defendants (334 U.S. 131, 150). But that does not mean that Paramount will dispose of 195 threatres, because it may comply by acquiring the interest of the other defendants in all of these

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theatres. Also, Paramount may retain all theatres in this class, or dispose of all, or any number in betwewen, according to the agreements which it may make with the other defendants as to buying or selling. There is, therefore, no assured divestiture of any theatre in this class. Any divested theatre ends in the ownership of some defendant.

As to joint ownerships with independents, the decree of December 31, 1946, required dissolution of the joint ownerships, but with permission to the defendants to acquire the interest of the independent, to buy or sell. That method of dissolution this Court held erroneous, and returned the case to the District Court for further inquiry, findings and action. This Court stated a rule to be used by the District Court for determining whether there should be relinquishment or retention of theatres in this class; namely, that theatres found to have been acquired or maintained by monopoly practices, or to have been used in restraint of trade, or theatres which would be independent and competitive but for the joint control, should be relinquished, while theatres representing innocent investments with non-operators might be retained.

As stated in the consent judgment, the District Court has made no inquiry and findings of any kind as to theatres in this class. Paramount has 993 theatres in this class, according to the opinion (334 U.S. 131, 150), or, according to the consent judgment, it has 942. The judgment states that, as to these 942 theatres, Paramount is enjoined "From acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres." (Paragraph 9) The judgment then immediately substracts 249 theatres from the 942, by providing that Paramount may acquire the interests of the independent co-owners after "negotiating" with them as to 249 theatres. (Paragraph 9(b)). The assured divestiture of theatres in this class, therefore, applies to only 693.

The third classification is of wholly owned theatres, of which there are about 258. This number is based on the

total of Paramount theatres stated in the opinion, i.e., 1,395. (334 U.S. 131, 167) The consent judgment lists 69 theatres in this class, to be disposed of by Paramount, according to the judgment, "for the purpose of creating substantial motion picture operating competition in the communities" named. (Judgment, p. 50).

The Paramount Theatre in Los Angeles of which appellant is the lessee, is one of the wholly owned theatres but is not among those to be divested. In the application for intervention facts are alleged showing that the theatre had been acquired and maintained by monopoly practices, and had been used in restraint of trade. The application prayed for a divestiture of that one theatre.

The consent judgment then provides that there shall be a division of the assets of Paramount into two kinds, and a division of the stockholders into two groups. This is not a literal provision, but is the principle and effect. The judgment is not described here in its own terms, because, for clarity, it has been necessary to reduce its complicated provisions to more simplified but correct statements.

The theatre assets located in the United States, i.e., the 633 or more non-divested theatres, are to be turned over to a corporation to be newly created, and the other assets are to be turned over to another corporation to be newly created, resulting in a film company and a theatre company. The theatre company will be the biggest aggregation of theatres in the world.

Paramount Pictures, Inc., is to be dissolved, and all of the stock of the two corporations is to be distributed pro rata to the Paramount Pictures Inc. stockholders; but a stockholder may not receive stock in both of the new corporations. A conventional procedure is prescribed to assure at least a temporary and partial non-identity of film company and theatre company stockholders, by the use of a trustee, temporary ownership certificates, withholding of dividends, etc., for the theatre company stock.

The theatre company shares are to be held by the trustee. When a certificate of ownership shall be presented to the

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trustee, with an affidavit that the owner has no shares in the picture company and is not acting for a person who has, the theatre shares are to be delivered to him. He is not prevented, however, from then transferring the shares received to a film company share holder. Film company share holders are not prevented from acquiring and retaining theatre stock in such transactions.

When the stock in the hands of the trustee shall have been reduced to one-third, it may be distributed to certificate holders owning film company stock, if the Court shall find no controlling influence of either company will occur. This would permit a community of interest as to one-third of both companies.

Both companies are permitted to have a minority of identical directors, as well as a minority of directors who have been formerly connected with Paramount Pictures Inc. This permission results from the requirement of the judgment that the by-laws of each company shall provide that a "majority" of its directors shall have had no prior connection, etc., with Paramount.

The judgment contains no provisions that the executive and managing officials of Paramount, many of whom have held their positions of control during many years of the monopoly and restraint period, and, therefore, are presumably the persons who have ordered, directed or done the acts of restraint and monopoly, shall not move over with the assets to the theatre company in similar positions. Presumably, those persons will be divided as the stockholders and assets are, and will hold similar positions in both companies. Thus, the proclivity for monopoly and restraint referred to by this Court, in so far as it may appertain to the stockholders, executives and property of Paramount, will likewise be transferred and divided between the two new companies.

The Paramount Theatre in Los Angeles, of which appellant is the lessee, is one of the theatres to be transferred to the new Paramount theatre company.

The net result is retention of a very large part of the fruits of monopoly, and a division thereof between the monopolizers.

ARGUMENT.

The Appeal Was Not Taken For and Will Not Cause Delay.

The purpose of the intervention was to add to the franchise injunction a short statement to prevent Paramount from dispossessing appellant under the condition attached to an exclusive dealing requirement, and to add one theatre to the number to be entirely relinquished.

Such an anti-eviction clause would be perfectly consistent with the anti-franchise provision, if not indeed quite necessary to make it effective and prevent its use against innocent lessees. The addition of one theatre was also consistent with the divestiture provisions, would save Partmar and would have been at least a token compliance with the mandate.

What will this appeal delay? The pendency of the questions involved, namely, whether an anti-eviction clause shall be entered and whether another theatre shall be disposed of, will not delay or in the slightest degree interfere with the consent judgment, unless the effectuation of that judgment depends upon the eviction of appellant and the retention by Paramount of the Los Angeles theatre. Nothing could be more frivilous than to contend that that is of any importance to Paramount.

The intervention could have been granted, and the consent judgment as well could have been entered as proposed. Neither was inconsistent and preclusive of the other. The consent judgment could have been entered by the Court subject to the intervention case. If the appellant should have prevailed, the relief would have been only a minor, harmonious and appropriate addition.

Trial of the intervention case could have been had in a week or less, much less in view of the fact that much or all of the evidence was probably already in the record.

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Even if this appeal shall be heard and the denial of intervention reversed, the intervention will be disposed of in the District Court long before the transactions provided for in the judgment shall have been concluded. As to various transactions, the judgment allows one year, two years, two years and six months, four to five years, and five years from the date of the judgment; and the trusteeship is to continue indefinitely until the purpose is fully served. (Judgment, pp. 48, 50, 53, 54.) Further extensions are not precluded, and will undoubtedly be sought and granted.

The judgment itself grants a veto upon the judgment in its entirety, even after it shall have been accepted and entered by the Court, to be exercised by the Paramount stockholders. If they shall reject the judgment it was to be of no force, and the case was to be restored to the docket for trial. That rejection would have entailed a delay greatly surpassing any delay incident to the intervention. The judgment states—

> This judgment shall be of no further force and effect and this cause shall be restored to the docket without prejudice to either party if the proposed reorganization of the Paramount defendants shall not have been approved by the stockholders of Paramount Pictures Inc., prior to April 19, 1949. (Judgment, p. 66)

It is argued that the intervention would delay conclusion of the case; this upon the assumption that this consent judgment brings the entire case to an end. That is not correct, because the case is still pending as to the Warner, Fox and Loew's defendants. Any delay incident to the intervention sinks into insignificance compared with the delay incident to that additional litigation. Again, the judgment reserves to Paramount the right to have its provisions later changed and made as favorable to it as those of any judgments against the remaining defendants, no matter how long delayed—potential delays and uncertainties exceeding any incident to the intervention.

The Questions on Which the Decision of the Cause Depends Are Substantial.

Appellant contends that under the intervention rule, it was entitled to intervene as a matter of right as distinguished from a matter of discretion, because (1) relative to the franchise, it was bound by the consent judgment, and (2) relative to its business at, and its leasehold estate in, the Paramount Theatre at Los Angeles, it was adversely affected by a distribution and disposition of property subject to the control and disposition of the court. On this motion to affirm, we consider the question to be whether there is any good reason to believe that appellant is right.

The District Court has held that a party to a franchise who is not a party to the case (among whom appellant is one), is "necessarily and properly bound" by the judgment as to franchises. It said—

> We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce. (*United States* v. *Paramount*, 66 F. Supp. 323, 347.)

That statement was made in a contested case, in which the status and interest of the absent party was presumably considered and safeguarded by the plaintiff and the court, and was presumably also based upon some showing as to franchises, their effect, etc. But that is not true as to the consent judgment. That judgment, although technically the judicial act of the Court, as a matter of fact is the private contract of Paramount and the plaintiff. As stated by Government counsel, it is an act of practical judgment

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of the parties; and by the Court, it is an "adjustment" . . . "entirely outside of our decree and the Supreme Court decision . . ." (Transcript of proceedings, March 3, 1949, pp. 1023, 1024, 1034, 1064.)

We submit that the question whether, in a case where a court in a consent judgment negotiated between and entirely formulated by the parties to the litigation, abrogates contracts with absent third parties, [redacted] absent party is entitled of right to intervene, is a substantial question.

Appellant has an unexpired leasehold estate in the Paramount Theatre at Los Angeles. Paramount Pictures, Inc., is the lessor, and has the reversionary fee simple estate. It cannot be doubted, therefore, that the Paramount estate is, to use the words of the intervention rule, "property which is in the custody or subject to the control or disposition of the court". Paramount contends that the provisions of the consent judgment relative to franchises and divestiture, authorize and require it in turn to divest Partmar of the leasehold estate. Therefore, Paramount contends that the leasehold estate also is property which is also subject to control and disposition by the court.

We submit, therefore, that the questions whether the leasehold property of Partmar has been subjected to the control and disposition of the court, and whether it has been dealt within the consent judgment, directly or indirectly, are also substantial questions.

We submit also that the question whether appellant was entitled to intervene to procure enforcement, in a very limited degree, of the discarded mandate of this Court, for the same purpose, in its own behalf, for which the mandate was given, is a very substantial question.

It is respectfully submitted that the motion to affirm should be denied.

RUSSELL HARDY,
Attorney for Appellant.

May 4, 1949.